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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
3/19/2020
DEANA WILLIAMSON, CLERK

SUZANNE ELIZABETH WEXLER
Appellant
v.

THE STATE OF TEXAS
Appellee

On Petition for Discretionary Review from
Appeal No. 14-17-00606-CR
in the Court of Appeals, Fourteenth District at Houston

Trial Court Cause No. 1513928
From the 177th Judicial District Court of Harris County, Texas
Hon. Robert Johnson, Judge Presiding

PETITION FOR DISCRETIONARY REVIEW

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ORAL ARGUMENT REQUESTED

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PRESIDING JUDGE:	Hon. Robert Johnson 177th District Court Harris County, Texas 201 Caroline, 16th Floor Houston, Texas 77002

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TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

Suzanne Elizabeth Wexler petitions this Court to review the Fourteenth Court of Appeals' opinion and judgment affirming the judgment and sentence of the trial court:

STATEMENT OF THE CASE

On August 18, 2016, a Harris County grand jury returned an indictment charging Appellant with the felony offense of possession with intent to deliver a controlled substance alleged to have occurred on or about June 16, 2016. (C.R. at 10). On June 27, 2017, a jury found the Appellant guilty as charged in the indictment. (4 R.R. (Trial) at 78; C.R. at 60-61).[1] On June 28, 2017, the trial court sentenced Appellant to 25-years' confinement in the Texas Department of Criminal Justice – Institutional Division. (7 R.R. (Trial) at 3-4; C.R. 60-61). On July 17, 2017, Appellant filed a motion for new trial and motion in arrest of judgment. (C.R. at 65-72). On July 28, 2017, Appellant filed an amended motion for new trial. (S.C.R. (08/07/18) at 4-19). Appellant timely filed her notice of appeal on July 17, 2017. (C.R. at 74-75). On May 31, 2018, the trial court denied Appellant's motion for new trial. (S.C.R. at 3). The trial court certified Appellant's right of appeal. (C.R. at 73).

[1] For reference, Appellant will cite the Reporter's Record from Appellant's trial as (R.R. (Trial).

STATEMENT OF PROCEDURAL HISTORY

On August 27, 2019, the Fourteenth Court of Appeals issued an opinion affirming the judgment of the trial court. *Wexler v. State*, No. 14-17-00606-CR, 2019 Tex. App. LEXIS 7751 (Tex. App.—Houston [14th Dist.] Aug. 27, 2019, pet. filed) (designated for publication).[2] See Appendix A. Justice Hassan filed a dissenting opinion. *Id.* at *20. See Appendix B. On September 5, 2019, Appellant filed a motion for rehearing. After requesting a response from the State, a majority of the panel denied Appellant's motion for rehearing on November 19, 2019, with Justice Hassan indicating that she would have granted rehearing. See Appendix C. On December 4, 2019, Appellant moved for *en banc* reconsideration. On February 27, 2020, the Fourteenth Court of Appeals denied Appellant's motion. Justices Hassan and Poissant would have granted *en banc* reconsideration. See Appendix D.[3]

STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully requests oral argument.

GROUND FOR REVIEW

Whether the Court of Appeals erred by concluding that Appellant's statement to Detective Hill was not obtained via a custodial interrogation without the benefit of any warnings when the statement was made after Appellant was ordered to involuntarily leave a residence by an overwhelming police presence and placed into the back of a police car?

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[2] The panel that decided this case was composed of Wise, Zimmerer, and Hassan, JJ., with Justice Zimmerer signing the opinion.

[3] Justices Zimmerer and Bourliot did not participate.

REASON FOR REVIEW

Appellant contends that this Court should grant discretionary because the Fourteenth Court of Appeals has decided an important question of state or federal law in a way that conflicts with the applicable decisions of the Court of Criminal Appeals or the U.S. Supreme Court. See TEX. R. APP. P. 66.3(c).

STATEMENT OF FACTS

Detective Jerome Hill, a narcotics detective with the South Houston Police Department, was investigating the residence where Appellant was located. (3 R.R. (Trial) at 32, 34-35). Eventually, Detective Hill obtained a search warrant for the residence. (3 R.R. (Trial) at 39-42; 7 R.R (Trial) State's Exhibit 2). Detective Hill testified that Appellant became a suspect 11 days prior to the raid, and he later detailed how she became a suspect. (3 R.R. (Trial) at 51-52, 114-115, 129-130).

The evidence demonstrated that 20 to 25 twenty to twenty-five High Risk Operations ("HROU") deputies helped secure the residence. (3 R.R. (Trial) at 43-44, 107). Detective Hill described these deputies as being like a SWAT team. (3 R.R. (Trial) at 43-44). In addition to the HROU officers, a number of uniformed police officers and narcotics K-9 units were present during the raid on the residence. (3 R.R. (Trial) at 45). Officers also utilized an armored vehicle during their raid. (3 R.R. (Trial) at 46). It was from this armored vehicle that officers announced their presence via a public announce system ("PA") that was on the armored vehicle. (3 R.R. (Trial) at 46). Detective Hill also testified that the HROU team would normally surround a house.

(3 R.R. (Trial) at 126-127). PA from this armored vehicle told everyone inside of the residence to come out of the house as a search warrant was being executed on the residence. (3 R.R. (Trial) at 46, 50). Appellant came out of the house and HROU officers immediately detained her. (3 R.R (Trial) at 46-47, 49). The HROU officers, who had already started to enter the house, then put Appellant into the backseat of the police car. (3 R.R. (Trial) at 49).[4] Detective Hill then approached the car and told Appellant that they had a search warrant. (3 R.R. (Trial) at 58). He then asked her to tell him where the drugs were in order to save time, as they would eventually find the drugs. (3 R.R. (Trial) at 58). Appellant told Detective Hill the narcotics would be in her bedroom in a dresser drawer. (3 R.R. (Trial) at 58). After speaking with Appellant, the narcotics team went into the house and started the search. (3 R.R. (Trial) at 58). Crystal methamphetamine was discovered in the dresser drawer where Appellant said it would be. (3 R.R. (Trial) at 82-83).

SUMMARY OF THE ARGUMENT

The Fourteenth Court of Appeals erred by determining that Appellant was not subjected to a custodial interrogation when Detective Hill questioned her as to where drugs were located after Appellant involuntarily left the residence when she was ordered to do so by an overwhelming police presence. In determining that Appellant was detained pursuant to an investigative detention, the Court of Appeals overlooked

[4] Detective Hill believed that the HROU entered the home after Appellant had started to come outside, but he was not sure. (3 R.R. (Trial) at 51).

the circumstances as to why Appellant left the house and how she ended up in the back of the police car. Appellant was ordered to do so by what were described as SWAT officers from an armored vehicle along with other officers who were on scene who had potentially surrounded the house. Once Appellant stepped out of the house, SWAT officers detained her and placed her into the back of a police car. In addition, Detective Hill conveyed his subjective belief to Appellant that she was a suspect when he phrased his only question to her as him knowing that drugs were in the house, they had a search warrant and were going to find them, and Appellant should save them some trouble. Considering the totality of the objective circumstances, Appellant was physically deprived of her freedom of action in a significant way and officers created a situation that would have led Appellant to believe that her freedom of movement had been significantly restricted to the degree of an arrest. Appellant was neither free to leave, nor would have a reasonable person in her situation have believed she was free to leave. Thus, Appellant was subjected to a custodial interrogation without the benefit of any warnings.

ARGUMENT

Whether the Court of Appeals erred by concluding that Appellant's statement to Detective Hill was not obtained via a custodial interrogation without the benefit of any warnings when the statement was made after Appellant was ordered to involuntarily leave a residence by an overwhelming police presence and placed into the back of a police car?

A. Majority and Dissenting Opinions in the Fourteenth Court of Appeals

In addressing Appellant's issue, the majority "disagree[d] that appellant…established that she was in custody when Hill asked her about the location of the drugs." *Wexler*, 2018 Tex. App. LEXIS 7751 at *12. Initially, the majority determined "[t]he fact that appellant's freedom of movement was restricted does not establish that she was under custodial arrest because a person temporarily detained for purposes of investigation also has her freedom of movement restricted." *Id.*, citing *Ortiz v. State*, 421 S.W.3d 887, 890 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd). The majority opinion determined that "[t]here [was] no evidence in the record that the police used physical force to remove appellant from the house, handcuffed her at any time, threatened her, displayed a firearm, or even spoke to her in a hostile tone." *Wexler*, 2018 Tex. App. LEXIS 7751 at *13. Concluding that the Appellant's situation was more akin to an investigative detention, the majority concluded that "[t]here was also evidence that appellant's detention was relatively brief and that the police did not remove appellant from the scene prior to Hill's question." *Id.* at *13-14. Finally, the majority determined that Detective Hill did not convey his belief that Appellant was a suspect to her through his question. *Id.* at *14 ("Hill was the only officer to talk with

appellant and he did not inform her that she under arrest or even a suspect."). Thus, the majority held "that the record supports the trial court's implied conclusion that appellant was temporarily detained, not under arrest, when Hill asked her were the drugs were located. As a result, Hill was not obligated to provide appellant the warnings required by *Miranda* and article 38.22 of the Code of Criminal Procedure." *Id.* at *15-16.

Justice Hassan authored a dissenting opinion disagreeing with the majority's conclusion that "Appellant was not in custody at the time of her inculpatory and custodial interrogation." *Id.* at *20. She summarized her opinion by writing:

> Appellant complied with police instructions (conveyed via loudspeaker from an armored police vehicle by High Risk Operations Unit personnel), exited the residence in which she was previously located as an armed SWAT team prepared to enter and conduct a safety sweep, was placed in a police car, was informed a search of the home from which she just exited would be performed, was informed the drugs secreted therein would be found, was asked where said drugs would be found (an inherently inculpatory question under the circumstances), and was never informed she was free to leave. Under these facts, a reasonable person [would] believe that [s]he is under restraint to the degree associated with an arrest. Because Appellant's statement to the officer during this questioning was the only evidence that directly linked her to the drugs for which she was prosecuted, I dissent.

Id. at *20-21 (internal citations and quotations omitted).

B. Applicable Law

"A person is considered in custody if a reasonable person in the same circumstances would have perceived their physical freedom to be restricted 'to the degree associated with a formal arrest.'" *Martinez v. State*, 496 S.W.3d 215, 218-219

(Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). See also *Stansbury v. California*, 511 U.S. 318, 322 (1994). "Custodial interrogation is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miller v. State*, 196 S.W.3d 256, 264 (Tex. App.—Fort Worth 2006, pet. ref'd), citing *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). "If an investigation is not at an accusatorial or custodial stage, a person's Fifth Amendment rights have not yet come into play and the voluntariness of those rights is not implicated." *Id.*, citing *Melton v. State*, 790 S.W.2d 322, 326 (Tex. Crim. App. 1990). "This determination focuses on the objective circumstances of the interrogation and not on the subjective views of either the interrogating officers or the person being questioned." *Aguilera v. State*, 425 S.W.3d 448, 456 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd), citing *Stansbury*, 511 U.S. at 322. "However, a stop is deemed an investigative detention when a police officer detains a person reasonably suspected of criminal activity to determine his identity or to momentarily maintain the status quo to garner more information." *Akins v. State*, 202 S.W.3d 879, 885 (Tex. App.—Fort Worth 2006, pet. ref'd), citing *Hoag v. State*, 728 S.W.2d 375, 380 (Tex. Crim. App. 1987). A person held for investigative detention is not in custody. *Dowthitt v. State*, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996). This Court "has provided a list of factors properly considered when determining whether the seizure was a detention or arrest:

> [1] the amount of force displayed, [2] the duration of a detention, [3] the efficiency of the investigative process and whether it is conducted at the original location or the person is transported to another location, [4] the officer's expressed intent—that is, whether he told the detained person that he was under arrest or was being detained only for a temporary investigation, and [5] any other relevant factors."

State v. Whittington, 401 S.W.3d 263, 272 (Tex. App.—San Antonio 2013, no pet.), quoting *State v. Sheppard*, 271 S.W.3d 281, 291 (Tex. Crim. App. 2008)

This Court has also established four general situations which may constitute custody: (1) if the suspect is physically deprived of his freedom of action in any significant way; (2) if a law-enforcement officer tells the suspect not to leave; (3) if a law-enforcement officers create a situation that would lead a reasonable person to believe his freedom of movement has been significantly restricted; or (4) if there is probable cause to arrest and law-enforcement officers did not tell the suspect he is free to leave." *Martinez*, 496 S.W.3d at 218-219, citing *Gardner v. State*, 306 S.W.3d 274, 294 (Tex. Crim. App. 2009).[5] "For the first three situations, the *Stansbury* decision suggests that the restriction of freedom of movement must elevate to the level of

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[5] These four factors are not exhaustive. See *State v. Ortiz*, 382 S.W.3d 367, 376-377 (Tex. Crim. App. 2012). In response to the State's contention in *Ortiz* "that the court of appeals was required to, but did not, fit the facts of the instant case into of the[] four *Dowthitt* categories before it could declare that the [defendant] was in custody for *Miranda* purposes[,]" this Court determined:

> this is a distortion of the import of our holding in *Dowthitt*. The *Dowthitt* categories were intended to be merely descriptive, not exhaustive. We held that the four categories "*at least*…may constitute custody. We never said that, in order for a set of circumstances to constitute custody, an appellate court must be able to fit it into one of these descriptive categories. The State's suggestion otherwise is at odds with out insistence, in *Dowthitt* itself, that Fifth Amendment custody determinations should be made on a case-by-case basis, considering all of the objective circumstances.

Id. at 376-377

arrest, not merely investigative detention." *Ramirez v. State*, 105 S.W.3d 730, 739 (Tex. App.—Austin 2003, no pet.). "Furthermore, in determining if a person is in custody, a court "consider[s] whether, in light of the particular circumstances, a reasonable person would have felt that he was at liberty to terminate the interrogation and leave." *Aguilera*, 425 S.W.3d at 456, citing *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). "Factors relevant to a custody determination include: (1) probable cause to arrest; (2) subjective intent of the police; (3) focus of the investigation; and (4) subjective belief of the defendant." *Id.*, citing *Dowthitt*, 931 S.W.2d at 254. "Because, under *Stansbury*, the custody determination is based entirely on objective circumstances, factors two and four are irrelevant except to the extent that they are manifested in the words or actions of law enforcement officials." *Id.*, citing *Dowthitt*, 931 S.W.2d at 254 and *Stansbury*, 511 U.S. at 323.

C. Analysis

Appellant contends that the evidence demonstrates that she was subjected to a custodial interrogation, not an investigative detention, as determined by the majority. Initially, Appellant takes issue with the majority's statement that"[w]hile there were numerous police officers on the scene, there is no evidence appellant was aware of that number, there is also no evidence appellant was aware that the police had blocked access to the street, or that there was armored vehicle on the scene." *Wexler*, 2019 Tex. App. LEXIS 7751 at *12. Appellant contends that the record does not support the majority's statements. Detective Hill testified that officers with the HROU

announced their presence through the PA system in the armored vehicle and that the people in the house knew it was about to be searched. (3 R.R. (Trial) at 46, 50). Furthermore, it was officers with the HROU who put Appellant in the back of the squad car and those officers were entering the house as Appellant was coming into the residence. (3 R.R. (Trial) at 51). Thus, the evidence at the very least supports the proposition that Appellant was aware that officers were in an armored vehicle on scene. The record also supports the proposition that there were SWAT officers on scene because HROU officers detained Appellant as she leaving the residence. It is also a reasonable inference that Appellant would have been aware that there was a sizeable contingent of officers on scene as she came out of the house as the officers with HROU were entering the residence.

The majority determined that Appellant's situation was more akin to an investigative detention instead of a custodial interrogation and they also determined that "[t]here [was] no evidence in the record that the police used physical force to remove appellant from the house, handcuffed her at any time, threatened her, displayed a firearm, or even spoke to her in a hostile tone." *Wexler*, 2018 Tex. App. LEXIS 7751 at *13-14. However, in making these determinations, the majority overlooked the circumstances of why Appellant left the house and how she ended up in the back of the police car. "[S]o long as the circumstances show that a person is acting only upon the invitations, request, or even urging of law enforcement, and there are not threats, either express or implied, that he will be taken forcibly, the

accompaniment is voluntary, and such person is not in custody." *Miller*, 196 S.W.3d at 264, citing *Anderson v. State*, 932 S.W.3d 502, 505 (Tex. Crim. App. 1996), *cert denied*, 521 U.S. 1122 (1997). Appellant did not voluntarily come out of the house on her own accord, she was ordered to do so by what were described as SWAT officers from an armored vehicle. (3 R.R. (Trial) at 43-46). HROU officers had blocked off the street at both ends of the block and announced their presence to the home via PA from an armored vehicle telling everyone inside to come out the house as a search warrant was being executed. (3 R.R. (Trial) at 45-46). Once Appellant stepped out of the house, the HROU officers were at the very least beginning to go into the house and they were the ones who detained her and placed her into the back of a police car. (3 R.R. (Trial) at 46-47, 49, 51). Detective Hill testified that the people in the house knew the house was about to be searched. (3 R.R. (Trial) at 50). The house Appellant came out of was also potentially surrounded. (3 R.R. (Trial) at 45-46). Finally, although Detective Hill did not affirmatively state to Appellant that she could not leave, he did not affirmatively tell Appellant that she was free to leave either. In fact, Detective Hill later testified that Appellant was not free to go. (3 R.R. (Trial) at 111).

In addition, officers utilized an implied threat in order to have Appellant leave the house into a police dominated atmosphere to then be immediately detained and placed into the back seat of a marked police car whereupon she was immediately questioned. That implied threat, as noted by Justice Hassan in her dissenting opinion was "that Appellant would (at least) be forcibly seized if she did not voluntarily leave

the house (then submit to a detained interrogation)[.]" *Wexler*, 2019 Tex. App. LEXIS 7751 at *27 (Hassan, J., dissenting), citing *Martinez v. State*, 337 S.W.3d 446, 455 (Tex. App.—Eastland 2011, pet. ref'd). In other words, "Appellant left the protections of a private home after being instructed by an organized and well-equipped amassment of law enforcement personnel." *Id.* at *23 (Hassan, J., dissenting). "Texas has long embraced the axiom that, aside from the assertion of physical dominion over a suspect, it is also possible an arrest can be accomplished once a suspect has submitted to the officer's authority." *Medford v. State*, 13 S.W.3d 769, 773 (Tex. Crim. App. 2000), citing *Wyatt v. State*, 120 Tex. Crim. 3, 47 S.W.2d 827, 829 (Tex. Crim. App. 1932) and *Shannon v. Jones*, 78 Tex. 141, 47 S.W. 477 (Tex. 1890). There can be no doubt in Appellant's case that she submitted to the officer's show of authority, a show of authority arising from having SWAT officers ordering a person out of a house because they had a search warrant from the PA of an armored vehicle. Officers continued to show their authority by having those same HROU officers immediately detain Appellant and placing her in the back of a marked police car to where she immediately questioned by Detective Hill. Based on the foregoing, the first and third factors of *Dowthitt* are implicated. Appellant was physically deprived of her freedom of action in a significant way and officers created a situation that would have led Appellant to believe that her freedom of movement had been significantly restricted. Appellant was neither free to leave, nor would have a reasonable person in her

situation have believed she was free to leave. Appellant could not simply get out of the police car and walk away.

"Furthermore, in determining if a person is in custody, a court "consider[s] whether, in light of the particular circumstances, a reasonable person would have felt that he was at liberty to terminate the interrogation and leave." *Aguilera*, 425 S.W.3d at 456. "Factors relevant to a custody determination include: (1) probable cause to arrest; (2) subjective intent of the police; (3) focus of the investigation; and (4) subjective belief of the defendant." *Id.*, citing *Dowthitt*, 931 S.W.2d at 254. "Because, under *Stansbury*, the custody determination is based entirely on objective circumstances, factors two and four are irrelevant except to the extent that they are manifested in the words or actions of law enforcement officials." *Id.*, citing *Dowthitt*, 931 S.W.2d at 254 and *Stansbury*, 511 U.S. at 323. As the dissenting opinion points out, "[t]he officers here were not conducting a general investigation; instead, they specifically targeted a specific house, acquired a warrant therefor, and then focused on (then detained) Appellant when she compliantly egressed therefrom." *Wexler*, 2019 Tex. App. LEXIS 7751 at *27 (Hassan, J., dissenting), citing *Anrica v. State*, 516 S.W.2d 924, 926 (Tex. Crim. App. 1974). Detective Hill testified that what led him to considering Appellant as a suspect was information he had obtained indicating that Appellant and her boyfriend were selling crystal methamphetamine at the residence. (3 R.R. (Trial) at 114-115, 129-130). He also testified that the Appellant became a suspect 11 days

before the raid. (3 R.R. (Trial) at 51-52). Furthermore, Detective Hill's question clearly demonstrated that Appellant was the focus of the investigation:

> We have a search warrant. Tell me where the narcotics are. It will save us some time doing the search. We're going to find it no matter what.

(3 R.R. (Trial) at 58).

In addition, the question that Detective Hill asked Appellant did not concern general matters such as routine questions incident to booking or attempting to ascertain Appellant's identification, but specifically designed to elicit an incriminating testimonial response. See *Ramirez*, 105 S.W.3d at 741 ("By asking appellant whether there was 'anything else [he was] going to find in [the garage] that's illegal, any more marihuana,' [the officer] engaged in express questioning of appellant."). It was also a question where Detective Hill urged Appellant to cooperate with law enforcement. Thus, Appellant was clearly one of the focuses of the investigation being conducted by Detective Hill.

The majority also determined that Detective Hill did not convey his belief that Appellant was a suspect by his question to her. *Wexler*, 2019 Tex. App. LEXIS 7751 at *14 ("Hill was the only officer to talk with appellant and he did not inform her that she under arrest or even a suspect."). However, "if an officer manifests his belief to the detainee's that he is a suspect, then that officer's subjective belief becomes relevant to the determination of whether a reasonable person in the detainee's position would believe he is in custody." *State v. Ortiz*, 382 S.W.3d 367, 373 (Tex.

Crim. App. 2012). This is precisely what happened in Appellant's case and this Court's opinion in *Ortiz* is analogous. In *Ortiz*, an officer received conflicting information about where the defendant and his wife were traveling to after performing a traffic stop. *Ortiz*, 382 S.W.3d at 370. Prior to this, the defendant had informed officers he was on probation "'for drugs,' specifically 'one-eighth' of cocaine." *Id.* While the officer was waiting for backup, he returned to the defendant, "and ask him 'point blank,' 'How much drugs are in the car?'" *Id.* After the defendant responded "'No, No, No'", he consented to a search of his person and car. *Id.* Eventually, other officers arrived, had the defendant's spouse step out of the vehicle, patted her down, and handcuffed her. *Id.* Shortly after his wife was handcuffed, the officers signaled that they had discovered something and an officer turned to the defendant and said, "Yep. Turn around. Put your hands behind your back" and the defendant was handcuffed. *Id.* The officer also asked, "What kind of drugs does your wife, and the defendant responded with cocaine. *Id.* The defendant was not given *Miranda* warnings. *Id.* at 370-371.

In concluding that the defendant in *Ortiz* was subjected to a custodial interrogation without the benefit of any warnings, this Court determined:

> at the moment that Johnson elicited the cocaine statements from the appellee, a reasonable person in the appellee's position would have believed, given the accretion of objective circumstances, that he was in custody. The objective facts show that, by that time: (1) Johnson had expressed his suspicion to the appellee "point blank" that he had drugs in his possession; (2) two additional law enforcement officers had arrived on the scene; (3) Mrs. Ortiz and the appellee had both been patted down

> and handcuffed; and 4) the officers had manifested their belief to the appellee that he was connected to some sort of (albeit, as-yet undisclosed) illegal or dangerous activity on Mrs. Ortiz's part. These circumstances combine to lead a reasonable person to believe that his liberty was compromised to a degree associated with formal arrest.[6]

Id. at 373.

In this case, Detective Hill also expressed his belief that Appellant was a suspect when he asked her when he told her, "[W]e have a search warrant. Tell me where the narcotics are. It will save us some time doing the search. We're going to find it no matter what." Detective Hill's question clearly and directly communicated his suspicion that the Appellant possessed narcotics, and had them in the residence, when he asked her to tell him "where the narcotics are" in order to expedite his search of the house. What Detective Hill asked Appellant is no different from what the officer in *Ortiz* asked (how much drugs are in the car?) which the Court of Criminal Appeals determined expressed the officer's suspicion that the defendant possessed drugs. *Ortiz*, 382 S.W.3d at 372. In addition, similar to the defendant in *Ortiz*, Appellant was faced with the prospect of multiple officers being on scene and that "adds at least marginally to the…conclusion that [Appellant] was in custody for *Miranda* purposes[.]" *Id.* at 374.

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[6] In other words, the officer "unmistakably communicated to the [defendant] during course of the detention" his suspicion that the [defendant] had drugs when he asked ten minutes into a traffic stop "How much drugs are in the car" and the officer asked the [defendant] for permission to search his person and vehicle.

"Voluntary statements generally do not occur in response to a direct question from a police office." *Ramirez*, 105 S.W.3d at 741. "Appellant complied with police instructions (conveyed via loudspeaker from an armored police vehicle by High Risk Operations Unit personnel), exited the residence in which she was previously located as an armed SWAT team prepared to enter and conduct a safety sweep, was placed in a police car, was informed a search of the home from which she just exited would be performed, was informed the drugs secreted therein would be found, was asked where said drugs would be found (an inherently inculpatory question under the circumstances) and was never informed she was free to leave." *Wexler*, 2019 Tex. App. LEXIS 7751 at *20 (Hassan, J., dissenting). Thus, the totality of the circumstances demonstrates that the Appellant was in custody.

PRAYER

Appellant, Suzanne Elizabeth Wexler, prays that this Court grant this petition, set this case for submission, reverse the Fourteenth Court of Appeals' judgment, reverse the trial court's judgment, and remand this case to the trial court for a new trial. Appellant also prays for such other relief that this Court may deem appropriate.

Respectfully submitted,

Alexander Bunin
Chief Public Defender
Harris County Texas

/s/ Nicholas Mensch
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CERTIFICATE OF SERVICE

I certify that a copy of Appellant's Petition for Discretionary Review was served on John D. Crump of the Harris County District Attorney's Office and Stacey Soule of the Office of State Prosecuting Attorney on March 16, 2020 to the email addresses on file with the Texas e-filing system

/s/ Nicholas Mensch
Nicholas Mensch

CERTIFICATE OF COMPLIANCE

In accordance with Texas Rule of Appellate Procedure 9.4, I certify that this computer-generated document complies with the typeface requirements of Rule 9.4(e). This document also complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i) because this petition contains 4388 words (excluding the items exempted in Rule 9.4(i)(1)).

/s/ Nicholas Mensch
Nicholas Mensch

NO. _____

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

SUZANNE ELIZABETH WEXLER
Appellant
v.

THE STATE OF TEXAS
Appellee

On Petition for Discretionary Review from
Appeal No. 14-17-00606-CR
in the Court of Appeals, Fourteenth District at Houston

Trial Court Cause No. 1513928
From the 177th Judicial District Court of Harris County, Texas
Hon. Robert Johnson, Judge Presiding

APPENDIX

Majority Opinion and Judgment..... Appendix A

Dissenting Opinion.....Appendix B

Order Denying Motion for Rehearing.....Appendix C

Order Denying Motion for *en banc* Reconsideration.....Appendix D

Majority Opinion and Judgment... Appendix A

Affirmed and Majority and Dissenting Opinions filed August 27, 2019.

In The

Fourteenth Court of Appeals

NO. 14-17-00606-CR

SUZANNE ELIZABETH WEXLER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 1513928

MAJORITY OPINION

Appellant Suzanne Elizabeth Wexler was convicted of possession of methamphetamine with intent to distribute. *See* Tex. Health & Safety Code §§ 481.102, 481.112(d). The trial court sentenced appellant to serve 25 years in prison. Appellant appeals her conviction in two issues. Appellant asserts in her first issue that the trial court erred when it overruled her objection to the admission of a statement she made at the scene of her arrest and before she was given *Miranda* warnings. *See Miranda v, Arizona*, 384 U.S. 436 (1966). We overrule

this issue because appellant's statement was made before she was in custody. Appellant argues in her second issue that she received ineffective assistance of counsel because her trial counsel failed to request a trial continuance due to a missing defense witness. We overrule this issue because appellant has not demonstrated that she was prejudiced by her trial counsel's allegedly deficient handling of her case. We therefore affirm the trial court's judgment.

BACKGROUND

Jerome Hill is a narcotics detective with the South Houston Police Department. Hill was assigned to the Harris County Sheriff's Department Narcotics Task Force doing undercover narcotics work. Hill received information from the Humble Police Department that crystal methamphetamine had been sold from a residence located at 318 Avenue A in South Houston. Based on that information, Hill set up surveillance of the residence by a South Houston narcotics K-9 unit. The K-9 unit was instructed to monitor traffic in and out of the 318 Avenue A residence. The K-9 unit eventually made three traffic stops of vehicles leaving the 318 Avenue A address where methamphetamine was discovered.[1]

As a result of the three traffic stops, Hill believed that the 318 Avenue A residence was being used to distribute drugs. According to Hill, appellant lived at the 318 Avenue A house and she was a suspect in the investigation, in fact, she was one of two targets of the investigation.[2] Hill obtained a search warrant for the 318 Avenue A house. The plan for searching the house called for uniformed police to initially block access to Avenue A. The Harris County Sheriff's Office High

[1] The traffic stops occurred on June 5, June 9, and June 12. The largest amount of methamphetamine discovered was 73 grams found during the June 5 traffic stop.

[2] Hill identified a second target of his investigation as "Jimmy." Hill testified that he "guess[ed] that it was [Jimmy's] house." According to Hill, Jimmy was not present at the house during the search.

Risk Operations Unit ("HROU") would then surround the house, serve the warrant, and conduct a protective sweep of the house. Only when the protective sweep was completed, and any people in the house had been removed, would the narcotics officers enter the house to conduct the search for narcotics.

On June 16, 2016, the HROU, narcotics officers, and other uniformed police units arrived on the scene. The uniformed police units blocked off both ends of the street to prevent any traffic on the street while the warrant was being executed. The HROU surrounded the house and announced their intention to search the home based on a search warrant over a loud speaker.[3] The HROU directed anyone in the house to exit. Appellant came out of the house where she was detained by the HROU and placed in the back seat of a patrol car.[4] According to Hill, once appellant was placed in the patrol car, she was detained as part of the investigation and she was not free to leave. The HROU then began its protective sweep of the house to ensure there were no threats present.

While the HROU was performing its protective sweep of the house, Hill stated the following to appellant: "Hey, we have a search warrant. We're going to find the drugs. Just tell me where they are." Appellant responded that the narcotics were "in her bedroom in a dresser drawer." At the time that Hill spoke with appellant, the actual search of the house by narcotics officers had not started, and no illegal drugs had been found. While it is undisputed that appellant was placed in the backseat of a patrol car for officer safety and so that police could conduct the search of the house, there is no evidence she was handcuffed or

[3] According to Hill, the loud speaker was on an armored vehicle that the HROU uses to serve warrants.

[4] A second occupant of the house, John Forster, was found in the small addition at the back of the house with a small amount of black tar heroin. Forster was placed in the back of a second patrol car. Forster was eventually arrested and convicted.

otherwise restrained by officers. In addition, there is no evidence that officers pointed firearms at appellant or threatened her. There was also no evidence that Hill was hostile in tone when he addressed appellant. While Hill considered appellant a suspect at the time of the search, he did not tell appellant that she was a suspect.

Once HROU had completed the protective sweep of the house, the narcotics officers entered to conduct the search. The house had two bedrooms and a small addition had been added to the back. Inside appellant's bedroom, officers found female clothing, drug paraphernalia, several cell phones, scales, and marijuana individually bagged for sale. Additionally, the narcotics officers found 25.077 grams of methamphetamine in appellant's dresser drawer. Along with the methamphetamine, the police found "a bunch of plastic baggies and some currency." Police also found handgun ammunition and magazines. According to Hill, the items that the narcotics officers found inside the house were consistent with the sale of narcotics. Once the search of the house had been completed, Hill placed appellant under arrest.

During trial appellant objected to the admission of her statement made in response to Hill's question. In appellant's view, Hill's question was a custodial interrogation and she should have received the warnings required by *Miranda* and article 38.22 of the Code of Criminal Procedure before being questioned. Because she was not given those warnings, appellant argued that her statement should be excluded. After allowing appellant's trial counsel to conduct a voir dire examination of Hill outside the presence of the jury, the trial court overruled appellant's objection and admitted appellant's statement.

During her case, appellant called a single witness to testify, Jimmy Sherlock. Sherlock testified that he had been friends with appellant for about twenty years.

According to Sherlock, appellant had moved out of the Avenue A house in April and was living with him. Sherlock explained that appellant had broken up with her boyfriend, Jimmy McCullough, and had decided to move out of his house. Sherlock testified McCullough was a drug dealer and that he believed the drugs found in the house were his. Sherlock further testified that he went with appellant to the Avenue A house on June 16, 2016 to pick up the last of her possessions. When they arrived at the Avenue A house, Sherlock dropped appellant off and he left. During cross-examination, Sherlock revealed that he had been previously convicted of burglary and robbery. Sherlock also admitted that appellant was a close friend.

The jury found appellant guilty and she was sentenced to serve 25 years in prison. Appellant moved for a new trial claiming that her trial counsel was ineffective for, among other things, failing to request a continuance in order to compel John Forster to appear to testify. The trial court held a hearing on appellant's motion. During the motion for new trial hearing, appellant did not call Forster, or produce any evidence related to Forster's availability to testify during appellant's trial, or his prospective testimony. Appellant instead relied on Forster's affidavit that had been previously secured by appellant's trial counsel. The trial court denied appellant's motion. This appeal followed.

ANALYSIS

I. The trial court did not commit reversible error when it overruled appellant's objection and admitted appellant's statement into evidence.

Appellant argues in her first issue that the trial court committed reversible error when it overruled her objection to the admission of her statement made at the scene. In appellant's view, she was in custody when she was placed in the backseat of a patrol car, she should have received the warnings required by

Miranda and article 38.22 of the Code of Criminal Procedure before Hill questioned her, and because she did not, the trial court should have sustained her objection and excluded the statement.

Appellant did not file a pre-trial motion to suppress her statement. She instead objected to its admissibility during trial. After appellant objected, the trial court allowed appellant's trial counsel to question Hill outside the presence of the jury. The trial court then heard argument from appellant's counsel as well as the State before overruling appellant's objection. Because a motion to suppress is simply a specialized objection to the admissibility of evidence, we shall apply the same standard of review to the trial court's custody determination as if appellant had moved to suppress her statement. *See Kuether v. State*, 523 S.W.3d 798, 807, n.10 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd).

In reviewing a trial court's ruling on a motion to suppress, an appellate court applies an abuse-of-discretion standard and will overturn the trial court's ruling only if it is outside the zone of reasonable disagreement. *Martinez v. State*, 348 S.W.3d 919, 922 (Tex. Crim. App. 2011). We view the evidence in the light most favorable to the trial court's ruling. *Weide v. State*, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007). At a suppression hearing, the trial judge is the sole trier of fact and assesses the witnesses' credibility and decides the weight to give that testimony. *Id.* at 24–25. If a trial court has not made a finding on a relevant fact, we imply the finding that supports the trial court's ruling, so long as it finds some support in the record. *State v. Kelly*, 204 S.W.3d 808, 818–19 (Tex. Crim. App. 2006). We will sustain the trial court's ruling if it is reasonably supported by the record and is correct under any theory of law applicable to the case. *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006).

In *Miranda*, the Supreme Court of the United States held that "the

prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. at 444. Texas codified these safeguards in article 38.22 of the Texas Code of Criminal Procedure. Section 3(a) of article 38.22 provides that no oral statement of an accused "made as a result of custodial interrogation" shall be admissible against him in a criminal proceeding unless an electronic recording of the statement is made, the accused is given all specified warnings, including the *Miranda* warnings, and he knowingly, intelligently, and voluntarily waives the rights set out in the warnings. Tex. Code Crim. Proc. art. 38.22 § 3(a).

Miranda warnings and article 38.22 requirements are mandatory only when there is a custodial interrogation. *Herrera v. State*, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007). The meaning of "custody" is the same for purposes of both *Miranda* and article 38.22. *Id.* The State has no burden to show compliance with *Miranda* unless and until the record as a whole "clearly establishes" that the defendant's statement was the product of a custodial interrogation. *Id.* When considering whether a person is in custody for *Miranda* purposes, we apply a reasonable person standard. Our custody inquiry includes an examination of all the objective circumstances surrounding the questioning. *Herrera*, 241 S.W.3d at 525. The subjective belief of law enforcement officers about whether a person is a suspect does not factor into the custody determination unless that officer's subjective belief has been conveyed to the person being questioned. *Id.* at 525–26.

There are four general situations which may constitute custody: (1) when the suspect is physically deprived of his freedom of action in any significant way, (2) when a law enforcement officer tells the suspect that he cannot leave, (3) when law enforcement officers create a situation that would lead a reasonable person to

believe that his freedom of movement has been significantly restricted, and (4) when there is probable cause to arrest and law enforcement officers do not tell the suspect that she is free to leave. *Dowthitt v. State*, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996). Both state and federal courts recognize three categories of interaction between police and citizens: encounters, investigative detentions, and arrests. *Ortiz v. State*, 421 S.W.3d 887, 890 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd). Both detention and arrest involve a restraint on one's freedom; the difference is in the degree. *Id.* An arrest places a greater restraint on an individual's freedom of movement than does an investigative detention. *Id.* Persons temporarily detained for purposes of investigation are not in custody for *Miranda* purposes, and thus the right to *Miranda* warnings is not triggered during an investigative detention. *Hauer v. State*, 466 S.W.3d 886, 893 (Tex. App.—Houston [14th Dist.] 2015, no pet.). There is no bright line rule dividing investigative detentions and custodial arrests. *State v. Sheppard*, 271 S.W.3d 281, 291 (Tex. Crim. App. 2008). When called upon to make that determination, courts examine several factors including "the amount of force displayed, the duration of a detention, the efficiency of the investigative process and whether it is conducted at the original location or the person is transported to another location, the officer's expressed intent—that is, whether he told the detained person that he was under arrest or was being detained only for a temporary investigation, and any other relevant factors." *Id.*

Appellant argues that she was in custody when Hill asked her where in the house the drugs were located. In making this argument, appellant emphasizes the level of force present at the scene of the search. Specifically, appellant points out (1) the large number of officers on the scene,[5] (2) the presence of an HROU

[5] There is no evidence in the record establishing the exact number of police on the scene.

armored vehicle, (3) the police had blocked the street prior to the search, and (4) had potentially surrounded the house. Appellant also relies on the fact that the police placed her in the backseat of a patrol car as well as Hill's trial testimony that she was not free to leave. Appellant also points out that she "was not told that she was not under arrest." Finally, appellant asserts that Hill "expressed to the appellant his suspicion that the appellant possessed drugs through his only question to the appellant."

We disagree appellant has established that she was in custody when Hill asked her about the location of the drugs. We turn first to Hill's testimony that appellant was not free to leave once she was placed in the patrol car. The fact that appellant's freedom of movement was restricted does not establish that she was under custodial arrest because a person temporarily detained for purposes of investigation also has her freedom of movement restricted. *See Ortiz*, 421 S.W.3d at 890 ("Both detention and arrest involve a restraint on one's freedom of movement; the difference is the degree."). "If the degree of incapacitation appears more than necessary to simply safeguard the officers and assure the suspect's presence during a period of investigation, this suggests the detention is an arrest." *Id.* at 891 (internal quotation marks omitted). While there were numerous police officers on the scene, there is no evidence appellant was aware of that number. There is also no evidence appellant was aware that the police had blocked access to the street, or that there was an armored vehicle on the scene. Even if she was, this evidence goes to only one of the factors listed in *Sheppard*, the amount of force used.

There is no evidence in the record that the police used physical force to

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Hill did testify that there were between 20 and 25 HROU officers on the scene. Hill offered no testimony on the number of narcotics officers or uniformed patrol officers on the scene.

remove appellant from the house, handcuffed her at any time, threatened her, displayed a firearm, or even spoke to her in a hostile tone. *See Ortiz*, 421 S.W.3d at 891 ("The defendant bears the initial burden of demonstrating that a statement was the product of custodial interrogation, and the State has no burden to show compliance with *Miranda* until the defendant meets the initial burden."). There is however, evidence in the record that an investigation was under way when appellant was detained. *See Mount v. State*, 217 S.W.3d 716, 724 (Tex. App.—Houston [14th Dist.] 2007, no pet.) ("Whether a person is under arrest or subject to a temporary investigative detention is a matter of degree and depends upon the length of the detention, the amount of force employed, and whether the officer actually conducts an investigation."). Further, there was evidence that appellant was detained so the HROU could perform a protective sweep of the house. *See Sheppard*, 271 S.W.3d at 290 (concluding officer's handcuffing of defendant was temporary detention, not an arrest, because it was done, in part, to enable officer to make protective sweep of scene). There was also evidence that appellant's detention was relatively brief and that the police did not remove appellant from the scene prior to Hill's question. *See id.* at 291. Hill was the only officer to talk with appellant and he did not inform her that she was under arrest or even a suspect. *See Herrera*, 241 S.W.3d at 525–26 ("The subjective belief of law enforcement officials about whether a person is a suspect does not factor into our 'custody' determination unless an official's subjective belief was somehow conveyed to the person who was questioned."). Finally, it was undisputed that illegal drugs had not been found in the house at the time Hill asked appellant where the drugs were located and thus Hill did not have probable cause to arrest appellant at that moment. *See Hernandez v. State*, 107 S.W.3d 41, 47 (Tex. App.—San Antonio 2003, pet. ref'd) ("An officer who lacks probable cause but whose observations lead to a reasonable suspicion that a particular person has committed, is

committing, or is about to commit a crime, may detain that person briefly in order to investigate the circumstances that provoke that suspicion."). We conclude that the record supports the trial court's implied conclusion that appellant was temporarily detained, not under arrest, when Hill asked her where the drugs were located. As a result, Hill was not obligated to provide appellant the warnings required by *Miranda* and article 38.22 of the Code of Criminal Procedure. Therefore, the trial court did not err when it overruled appellant's objection and admitted her statement into evidence. We overrule appellant's first issue.

II. Appellant did not establish that she received ineffective assistance of counsel.

Appellant asserts in her second issue that her trial counsel was ineffective because he did not ask for a continuance to compel Forster to appear to testify during her trial.

A. Standard of review and applicable law

An accused is entitled to reasonably effective assistance of counsel. *King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983); *Bradley v. State*, 359 S.W.3d 912, 916 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd). However, reasonably effective assistance of counsel does not mean error-free representation. *Ex parte Felton*, 815 S.W.2d 733, 735 (Tex. Crim. App. 1991). Isolated instances in the record reflecting errors of omission or commission do not render counsel's performance ineffective, nor can ineffective assistance of counsel be established by isolating one portion of trial counsel's performance for examination. *Wert v. State*, 383 S.W.3d 747, 753 (Tex. App.—Houston [14th Dist.] 2012, no pet.). Therefore, when evaluating a claim of ineffective assistance, the appellate court looks to the totality of the representation and the particular circumstances of the case without

the benefit of hindsight. *Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011); *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

To establish ineffective assistance of counsel, a defendant must prove that (1) trial counsel's representation fell below the standard of prevailing professional norms, and (2) there is a reasonable probability that, but for the deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Hernandez v. State*, 726 S.W.2d 53, 55 (Tex. Crim. App. 1986) (applying *Strickland* standard to claims of ineffective assistance under the Texas Constitution). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the claim of ineffective assistance. *Strickland*, 466 U.S. at 697. If a criminal defendant can prove trial counsel's performance was deficient, he still must prove he was prejudiced by his trial counsel's actions. *Thompson*, 9 S.W.3d at 812. This requires the defendant to demonstrate a reasonable probability that the result of the proceeding would have been different if trial counsel had acted professionally. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Malett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Cox v. State*, 389 S.W.3d 817, 819 (Tex. Crim. App. 2012).

When, as here, an appellant raises an ineffective-assistance claim in a motion for new trial, we analyze the issue on appeal as a challenge to the trial court's denial of the motion for new trial. *See Charles v. State*, 146 S.W.3d 204, 208 (Tex. Crim. App. 2004) (holding appropriate standard of review for claim of ineffective assistance of counsel brought forth in motion for new trial is abuse of discretion); *Robinson v. State*, 514 S.W.3d 816, 823 (Tex. App.—Houston [1st

Dist.] 2017, pet. ref'd). In those circumstances, we review the trial court's application of the *Strickland* test through an abuse-of-discretion standard. *Charles*, 146 S.W.3d at 208. Generally, applying this standard means that we must decide whether the trial court's ruling was arbitrary or unreasonable. *See Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007). As a reviewing court, we must afford "almost total deference" to a trial court's determination of historical facts and its application of the law to fact questions the resolution of which turns on an evaluation of credibility and demeanor. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). In the absence of express findings, we presume that the trial court made all findings, express and implied, in favor of the prevailing party. *Okonkwo v. State*, 398 S.W.3d 689, 694 (Tex. Crim. App. 2013). We therefore view the evidence in the light most favorable to the trial court's ruling, and we will uphold that ruling if it was within the zone of reasonable disagreement. *See Webb*, 232 S.W.3d at 112.

B. Appellant has not shown that she was prejudiced by her trial counsel's decision to not ask for a continuance.

Appellant asserts in her second issue that her trial counsel's performance was deficient because he failed to ask for a continuance of the trial in order to compel Forster to appear and testify on her behalf. Appellant goes on to argue that she was prejudiced by this deficient performance because Forster's testimony would have been beneficial to her defense. According to appellant, if her trial counsel had sought a continuance, Forster, who was found in the house during the search with black tar heroin, would have "been able to testify consistently with some of the items that Mr. Sherlock testified to, such as the appellant moving out of the residence in early April [and that appellant] was only present at the residence during the raid to retrieve a few of her remaining items from the residence." Appellant also asserts that Forster would have been able to testify that

the methamphetamine found in the bedroom "dresser was not the appellant's, but Jimmy's." Appellant concludes by arguing that Forster's testimony was "necessary and crucial to the defense" because "it would have helped to corroborate the testimony of Mr. Sherlock, whose credibility was damaged by the State due to his prior conviction and would have provided testimony from someone who was actually present during the raid of the residence."

Appellant has not demonstrated that she was prejudiced by her trial counsel's failure to request a continuance because, by her own admission, Forster's proposed testimony was cumulative of Sherlock's testimony. *See Ex parte Flores*, 387 S.W.3d 626, 638 n.53 (Tex. Crim. App. 2012) ("Applicant cannot show prejudice for failure to call a witness whose testimony would be cumulative of an expert who did testify."); *Crawford v. State*, 355 S.W.3d 193, 199 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) (trial counsel was not ineffective for failing to call a passenger who was in defendant's car because defendant did not identify any fact to which witness would testify that trial court had not already heard from another witness); *Tutt v. State*, 940 S.W.2d 114, 121 (Tex. App.—Tyler 1996, pet. ref'd) (defendant's trial counsel was not ineffective for failing to call certain witnesses when proposed witnesses' testimony would have been cumulative of other testimony). Because appellant has not established the second *Strickland* prong, we conclude that the trial court did not abuse its discretion when it denied appellant's motion for new trial. We overrule appellant's second issue.

CONCLUSION

Having overruled appellant's issues on appeal, we affirm the trial court's judgment.

/s/ Jerry Zimmerer
Justice

Panel consists of Justices Wise, Zimmerer, and Hassan (Hassan, J., dissenting).
Publish — TEX. R. APP. P. 47.2(b).

August 27, 2019

JUDGMENT

The Fourteenth Court of Appeals

SUZANNE ELIZABETH WEXLER, Appellant

NO. 14-17-00606-CR V.

THE STATE OF TEXAS, Appellee

This cause was heard on the appellate record. Having considered the record, this Court holds that there was no error in the judgment. The Court orders the judgment **AFFIRMED**.

We further order this decision certified below for observance.

Judgment Rendered August 27, 2019.

Panel Consists of Justices Wise, Zimmerer, and Hassan. Majority Opinion delivered by Justice Zimmerer

Dissenting Opinion .... Appendix B

Affirmed and Majority and Dissenting Opinions filed August 27, 2019.

In The

Fourteenth Court of Appeals

NO. 14-17-00606-CR

SUZANNE ELIZABETH WEXLER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 1513928

D I S S E N T I N G O P I N I O N

The majority erroneously concludes Appellant was not in custody at the time of her inculpatory and custodial interrogation. Appellant complied with police instructions (conveyed via loudspeaker from an armored police vehicle by High Risk Operations Unit personnel), exited the residence in which she was previously located as an armed SWAT team prepared to enter and conduct a safety sweep, was placed in a police car, was informed a search of the home from which she just exited would be performed, was informed the drugs secreted therein would be

found, was asked where said drugs would be found (an inherently inculpatory question under the circumstances), and was never informed she was free to leave. Under these facts, "a reasonable person [would] believe that [s]he is under restraint to the degree associated with an arrest." *Dowthitt v. State*, 931 S.W.2d 244, 254 (Tex. Crim. App. 1996). Because Appellant's statement to the officer during this questioning was the only evidence that directly linked her to the drugs for which she was prosecuted, I dissent.

GOVERNING LAW

"'Custodial interrogation' is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Cannon v. State*, 691 S.W.2d 664, 671 (Tex. Crim. App. 1985) (citing *Orozco v. Tex.*, 394 U.S. 324 (1969); *Mathis v. United States*, 391 U.S. 1 (1968); and *Miranda v. Ariz.*, 384 U.S. 436 (1966)). *See also Miranda,* 384 U.S. at 444 ("By custodial interrogation, [the United States Supreme Court] mean[s] questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."). *Miranda* is a promise from the judiciary to the People; the majority breaks this promise by unreasonably concluding the instant facts do not constitute "custody" as a matter of newly-created Texas law without citation to any precedent which requires said conclusion.

"A person is in 'custody' only if, under the circumstances, a reasonable person would believe that his freedom of movement was restrained to the degree associated with a formal arrest." *Dowthitt,* 931 S.W.2d at 254; *see also Gardner v. State*, 306 S.W.3d 274, 294 (Tex. Crim. App. 2009). Texas law is clear that:

> [A]t least four general situations . . . may constitute custody: (1) when the suspect is physically deprived of his freedom of action in any significant way, (2) when a law enforcement officer tells the suspect that he cannot leave, (3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted, and (4) when there is probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave.

Dowthitt, 931 S.W.2d at 255 (citing *Shiflet v. State*, 732 S.W.2d 622, 629 (Tex. Crim. App. 1985)); *see also id.* ("[C]ustody is established if the manifestation of probable cause, combined with other circumstances, would lead a reasonable person to believe that he is under restraint to the degree associated with an arrest.").

ANALYSIS

The instant facts facially trigger at least the first and third variants in *Dowthitt*, the legal precedents sustaining same are readily ascertainable, and there is no compelling reason to ignore any (much less all) of them; as a result, I reject the majority's conclusion that Appellant was not in custody at the time of her inculpatory statements.

Once a focused[1] suspect is placed in a police vehicle under analogous circumstances, commonsense dictates that the suspect's "freedom of action" has

[1] *See Miranda,* 384 U.S. at 444 & n.4. *See also Shiflet*, 732 S.W.2d at 624 (citing *Escobedo v. Ill.*, 378 U.S. 478 (1964)) and *Ancira v. State*, 516 S.W.2d 924, 927 (Tex. Crim. App. 1974) ("The obvious purpose of the agents interrogating him was to elicit an incriminating statement for 'the investigation was no longer a general inquiry into an unsolved crime' but had begun 'to focus on a particular suspect'[.]"); *accord State v. Preston*, 411 A.2d 402, 405 (Me. 1980) ("The more cause for believing the suspect committed the crime, the greater the tendency to bear down in interrogation and to create the kind of atmosphere of significant restraint that triggers *Miranda* . . . .") (citing *U.S. v. Hall*, 421 F.2d 540, 545 (2d Cir. 1969) and Yale Kamisar, *"Custodial Interrogation" Within the Meaning of Miranda*, in Criminal Law and the Constitution, 335-85, Ann Arbor, Mich.: Institute of Continuing Legal Education, 1968).

been significantly impacted. *See Miranda*, 384 U.S. at 444. Most directly, such persons (as opposed to those who voluntarily enter such vehicles) are no longer free to be in the physical place where they were located before being placed in a police vehicle by a police officer;[2] while certain interactions in more public spaces would foreseeably yield less significant deprivations, Appellant left the protections of a private home only after being instructed by an organized and well-equipped amassment of law enforcement personnel. Appellant's placement in a police vehicle significantly impacted her "freedom of action" and constituted custody. *See U.S. v. Blum*, 614 F.2d 537, 540 (6th Cir. 1980) (defendant's placement in a police vehicle with a uniformed officer constituted a restriction on his freedom sufficient to constitute custody).

Comparable physical deprivations of *drivers*' freedoms have historically constituted custody in Texas even when there was no warrant. *See Ragan v. State*, 642 S.W.2d 489 (Tex. Crim. App. 1982) (citing *Gonzales v. State*, 581 S.W.2d 690

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[2] These facts are readily distinguished from non-custodial cases where people who have reason to believe officers suspect they committed a crime voluntarily accompany police officers investigating criminal activity to a certain location. *See Shiflet,* 732 S.W.2d at 630 (citing *Ruth v. State*, 645 S.W.2d 432 (Tex. Crim. App. 1979); *McCrory v. State*, 643 S.W.2d 725 (Tex. Crim. App. 1982); *Ragan v. State*, 642 S.W.2d 489 (Tex. Crim. App. 1982); *Stewart v. State*, 587 S.W.2d 148 (Tex. Crim. App. 1979); *Stone v. State*, 583 S.W.2d 410 (Tex. Crim. App. 1979); *Gonzales v. State*, 581 S.W.2d 690 (Tex. Crim. App. 1979); *Brooks v. State*, 580 S.W.2d 825 (Tex. Crim. App. 1979); *Scott v. State*, 571 S.W.2d 893 (Tex. Crim. App. 1978); *Newberry v. State*, 552 S.W.2d 457 (Tex. Crim. App. 1977); *Lovel v. State*, 538 S.W.2d 630 (Tex. Crim. App. 1976); *Allen v. State*, 536 S.W.2d 364 (Tex. Crim. App. 1976); *Bailey v. State*, 532 S.W.2d 316 (Tex. Crim. App. 1975); *Adami v. State*, 524 S.W.2d 693 (Tex. Crim. App. 1975); *Ancira,* 516 S.W.2d at 924; *Graham v. State*, 486 S.W.2d 92 (Tex. Crim. App. 1972); *Evans v. State*, 480 S.W.2d 387 (Tex. Crim. App. 1972); *Brown v. State*, 475 S.W.2d 938 (Tex. Crim. App. 1971); *Higgins v. State*, 473 S.W.2d 493 (Tex. Crim. App. 1971); *Calhoun v. State*, 466 S.W.2d 304 (Tex. Crim. App. 1971); *Tilley v. State*, 462 S.W.2d 594 (Tex. Crim. App. 1971); *Hoover v. State*, 449 S.W.2d 60 (Tex. Crim. App. 1969); and *Bell v. State*, 442 S.W.2d 716 (Tex. Crim. App. 1969)).

(Tex. Crim. App. 1979) (vehicle was weaving; driver was stopped for possible DWI and asked to sit in patrol car while his license was checked; he was not free to go; he was asked if he had been in trouble before); *Scott v. State*, 564 S.W.2d 759 (Tex. Crim. App. 1978) (driver stopped for routine license check, arrested for outstanding traffic warrant, and placed in patrol car; when pistol was found in his car, driver was asked to whom it belonged); *Newberry v. State*, 552 S.W.2d 457 (Tex. Crim. App. 1977) (driver was stopped for several traffic violations, and had difficulty getting out of his car and finding his license; he was asked if he had been drinking, what he had been drinking, how much he had been drinking, and what he had been doing; he was then "placed under arrest," although he had not been free to go since he was stopped); and *Harper v. State*, 533 S.W.2d 776 (Tex. Crim. App. 1976) (driver stopped for making a sudden turn while approaching a license check point; registration records did not match the make of car being driven; driver was asked to whom the car belonged)). Here, Appellant had just exited a private home after being instructed to do so from an armored police vehicle, there was a presumably valid search warrant for said home, she was placed in a police car, and *then* she was informed police would find the secreted drugs about which a police officer was asking while she was in the back seat of a police car in the midst of an organized police operation. I simply cannot agree with the majority's implicit finding that Appellant's freedom of action was not significantly impacted or that she (and all similarly situated persons) are not entitled to constitutional protections under comparable facts.

Additionally, these facts demonstrate law enforcement "create[d] a situation that would lead a reasonable person to believe that his [or her] freedom of movement ha[d] been significantly restricted[.]" *Dowthitt,* 931 S.W.2d at 255. "It is inconceivable that a person in such a situation could have reasonably concluded

that he or she was free just to walk away." *State v. Pies*, 748 N.E.2d 146, 151 (Ohio Ct. App. 2000); *see also State v. Snell*, 166 P.3d 1106, 1110 (N.M. Ct. App. 2007) (questioning after placement in back of police car with doors locked constituted custodial interrogation), *cert. denied*, 129 S. Ct. 626 (2008); *State v. Malik*, 552 N.W.2d 730, 731 (Minn. 1996) (questioning after placement in a police car was custodial where (1) police had knowledge of inculpatory acts, (2) police were going to conduct a search, and (3) no one informed defendant he was free to leave); *State v. Wash.*, 402 S.E.2d 851, 853 (N.C. Ct. App. 1991), *rev'd*, 410 S.E.2d 55, 56 (N.C. 1991) (per curiam) (Greene, J. dissenting) (defendant was in custody when he was placed in the back of a police car with handles that did not work and his movement was restricted); *State v. Preston*, 411 A.2d 402, 405 (Me. 1980) (questioning defendant alone in a police car "increased the coercive nature of the interrogation"); *Commonwealth v. Palm*, 462 A.2d 243, 246 (Pa. 1983) (interrogation in front seat of Game Protector's vehicle was a custodial investigation); and *People v. Sanchez*, 280 A.D.2d 891 (N.Y. App. Div. 2001) (reasonable people placed in a police car "would have believed that he [or she] was in custody") (citing *People v. Yukl*, 256 N.E.2d 172 (N.Y. 1969), *cert. denied,* 400 U.S. 851 (1970)). While there is no inherent wrongdoing associated with police creating a situation where reasonable people believe they are incapable of leaving, the majority ignores the impropriety of making inculpatory interrogatories after creating such a scenario without first providing the People with *Miranda* warnings.

In an era where the ubiquity of recording devices makes the People increasingly aware that some alleged suspects are (*inter alia*) beaten, choked, and executed for markedly less, the majority's conclusion that Appellant was free to simply walk away defies reason. Indeed, many people who have such unfortunate interactions with law enforcement do not have the forewarning typically associated

with (1) first being placed in a police vehicle, (2) a judicially-approved warrant, (3) an armored police vehicle, (4) a well-armed SWAT team preparing to conduct a protective sweep of the house from which they just exited under police instruction, (5) traffic being re-routed away the block, *and then* (before, during, or after accusatory questioning based on an officer's personal and well-informed suspicions of guilt) (6) unilaterally departing from police vehicles without express permission to do so. *Cf. Dewey v. State*, 629 S.W.2d 885, 886 (Tex. App.—Ft. Worth 1982, pet. ref'd) (appellant was not in custody where he exited the police car during a conversation with officers, walked to his car, retrieved a beer, and returned to the officers' car).

The officers here were not conducting a general investigation; instead, they specifically targeted a specific house, acquired a warrant therefor, and then focused on (then detained) Appellant when she compliantly egressed therefrom. *See Ancira*, 516 S.W.2d at 926 ("The questioning of appellant by the officer in the police vehicle cannot be characterized as a general investigation into an unsolved crime, nor was the questioning made under circumstances to bring it within the ambit of general on-the-scene investigatory process."). Additionally, the presence of multiple police cars adds (at least marginally) to the question whether Appellant was in custody for *Miranda* purposes. *See State v. Ortiz*, 382 S.W.3d 367 (Tex. Crim. App. 2012). Finally, the implicit threat that Appellant would (at least) be forcibly seized if she did not voluntarily leave the house (then submit to a detained interrogation) expressly contravenes the majority's conclusion that she was not in custody. *Martinez v. State*, 337 S.W.3d 446, 455 (Tex. App.—Eastland 2011, pet. ref'd) ("When the circumstances show that the individual acts upon the invitation or request of the police and there are no threats, express or implied, that he will be forcibly taken, then that person is not in custody at the time.") (citing *Dancy v.*

State, 728 S.W.2d 772, 778-79 (Tex. Crim. App. 1987)); *see also Miller v. State*, 196 S.W.3d 256, 264 (Tex. App.—Ft. Worth 2006, pet. ref'd) (citing *Anderson v. State*, 932 S.W.2d 502, 505 (Tex. Crim. App. 1996), *cert. denied*, 521 U.S. 1122 (1997) and *Sander v. Tex.*, 52 S.W.3d 909, 915 (Tex. App.—Beaumont 2001, pet. ref'd) (citing *Anderson* and *Dowhitt*)).

As a result, Appellant was in custody within the meaning of the United States Constitution and she was entitled to *Miranda* warnings as a matter of clearly established and heretofore unbroken law. The trial court erred in admitting her statement.

Finally, the inclusion of Appellant's statement at trial was the *only* evidence the State presented to connect her to the drugs and the State relied heavily on Appellant's statement in its closing argument. Even the State's witness who was responsible for collecting and logging the evidence at the scene testified he did not know of anything connecting that evidence to Appellant. Jimmy Sherlock testified on Appellant's behalf that Appellant had been living with him for months prior to the search at issue. Other than her statement to the officer while in custody on the scene, there was no evidence in the record connecting Appellant to the drugs found at the home. Therefore, the admission of the statement was harmful to Appellant.

For the foregoing reasons, I would reverse and remand to the trial court for a new trial without the statement obtained while Appellant was in custody, and therefore I dissent.

/s/ Meagan Hassan
Justice

Panel consists of Justices Wise, Zimmerer, and Hassan (Zimmerer, J., majority).

Order Denying Motion for Rehearing..Appendix C

FILE COPY

Fourteenth Court of Appeals

301 Fannin, Suite 245
Houston, Texas 77002

Tuesday, November 19, 2019

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RE: Court of Appeals Number: 14-17-00606-CR
Trial Court Case Number: 1513928

Style: Suzanne Elizabeth Wexler
v.
The State of Texas

Please be advised that on this date the Court **DENIED APPELLANT'S** motion for rehearing in the above cause. Justice Hassan would grant

Panel Consists of Wise, Zimmerer, Hassan

Sincerely,

/s/ Christopher A. Prine, Clerk

Order Denying Motion for *en banc* Reconsideration ..... Appendix D

FILE COPY

Fourteenth Court of Appeals

301 Fannin, Suite 245
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Thursday, February 27, 2020

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RE: Court of Appeals Number: 14-17-00606-CR
Trial Court Case Number: 1513928

Style: Suzanne Elizabeth Wexler
v.
The State of Texas

Please be advised that on this date the court **DENIED APPELLANT'S** motion for rehearing en banc in the above cause. (Justices Hassan and Poissant would grant en banc reconsideration)

Panel Consists Of Chief Justice Frost and Justices Christopher, Wise, Jewell,, Spain, Hassan and Poissant (Justices Zimmerer and Bourliot not participating)

Sincerely,

/s/ Christopher A. Prine, Clerk

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